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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE NASH COUNTY BOARD OF EDUCATION, *Petitioner,*

v.

THE BILTMORE COMPANY, *et al., Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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SUPPLEMENTAL BRIEF OF THE RESPONDENTS IN RESPONSE TO THE BRIEF OF THE STATE OF NORTH CAROLINA, AMICUS CURIAE

[Counsel listed inside front cover]

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

* GEORGE WARD HENDON
ADAMS, HENDON, CARSON & CROW, P.A.
601 First National Bank Building
82 Patton Avenue
P.O. Box 7246
Asheville, North Carolina 28807
(704) 252-7381
JOSEPH R. GLADDEN, JR.
KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303
Counsel for The Biltmore Company

* JOHN M. MURCHISON, JR.
W. T. COVINGTON, JR.
KENNEDY, COVINGTON, LOBDELL & HICKMAN
3300 NCNB Plaza
Charlotte, North Carolina 28280
(704) 377-6000
GLENN S. DENNIS
HOUSE COUNSEL
BORDEN, INC.
180 East Broad Street
Columbus, Ohio 43215
Counsel for Borden, Inc.

* JOSEPH H. LEONARD
LEONARD AND SNYDER
113 West Center Street
P.O. Box 614
Lexington, North Carolina 27292
(704) 249-9156
J. MELVILLE BROUGHTON, JR.
BROUGHTON, WILKINS & CRAMPTON, P.A.
Suite 1921 Center Plaza Building
411 Fayetteville Street Mall
P.O. Box 2387
Raleigh, North Carolina 27602
Counsel for Coble Dairy Products Cooperative, Inc.

* FRED D. TURNAGE
CLEARY, GOTTLIEB, STEEN & HAMILTON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 828-3000
ROBERT H. DUESENBERG
VICE PRESIDENT AND GENERAL COUNSEL
PET, INC.
Pet Plaza
400 South Fourth Street
St. Louis, Missouri 63102
WRIGHT T. DIXON, JR.
BAILEY, DIXON, WOOTEN, McDONALD & FOUNTAIN
P.O. Box 2246
Raleigh, North Carolina 27602
Counsel for Pet, Inc.

* HENRY A. MITCHELL, JR.
SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN
First Union National Bank Building
P.O. Box 31
Raleigh, North Carolina 27602
(919) 821-1220
Counsel for Pine State Creamery Co.
JOHN R. JORDAN, JR.
JORDAN LAW OFFICES
Suite 1414 Branch Banking and Trust Building
333 Fayetteville Street Mall
Raleigh, North Carolina 27602

* DAVID L. AUFDERSTRASSE
CHADWELL, KAYSER, RUGGLES, McGEE & HASTINGS
8500 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-2100
THEODORE L. BANKS
KRAFT, INC.
Kraft Court
Glenview, Illinois 60025
Counsel for Kraft, Inc.
WILLIAM A. CAREY

* ST. JOHN BARRETT
MORTON HOLLANDER
BARNETT, ALAGIA & CAREY
1627 K Street, N.W. #900
Washington, D.C. 20006
(202) 785-0500
JERRY W. AMOS
BROOKS, PIERCE, McLENDON, HUMPHREY & LEONARD
1400 Wachovia Building
201 North Elm Street
Drawer U
Greensboro, North Carolina 27402
Counsel for Flav-O-Rich, Inc.

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* *Counsel of Record*

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SUPPLEMENTAL BRIEF OF THE RESPONDENTS IN RESPONSE TO THE BRIEF OF THE STATE OF NORTH CAROLINA, AMICUS CURIAE

This supplemental brief is submitted jointly by the respondents under Rule 22.6 in response to the brief *amicus* filed by the Attorney General of North Carolina on behalf of the State of North Carolina on June 19, 1981, two days after the filing of respondents' joint brief in opposition. This brief addresses only matters newly raised by the State.

The State of North Carolina, reiterating the position it took as *amicus* in the Court of Appeals, asserts that the earlier state court judgment did not bind its local school boards because the state attorney general, in bringing the earlier action, did not intend that either he

or the State would thereby represent the interest of the local boards.[1]

While the Attorney General, in speaking for the State, asserts that he had authority under state law to vindicate fully the legal interest of the local school boards, with or without their express authorization, he contends he chose not to do so and instead decided to represent their interest only through the class action mode. The Attorney General argues that the determinations of the two courts below, each adverse to the Attorney General's contention, are in error and will have a "chilling effect" upon his future prosecution of state antitrust actions. NCBr 15.[2]

The *amicus* brief presents no basis for the granting of a writ of certiorari. It agrees with the rulings below that the state attorney general had ample authority to represent the local school boards in the state court proceeding and to obtain full relief on their behalf without relying upon the certification of a class action. NCBr 6-7. It does not quarrel with the conclusion of the two courts below that the antitrust laws of North Carolina essentially replicate federal antitrust law and that the State had the right to the same relief, both on its own behalf and on behalf of all of its local school boards, in the state proceeding that it would have in federal court. See Pet.App. 19-21, 62, 69. Nor does the State assert

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[1] In the Court of Appeals the state attorney general asserted that this was the *only* issue and that if the attorney general did "*actually* represent Nash County (or any other board of education) in the state action," then "the judgment below is proper and should be sustained." Amicus Curiae Brief of the State of North Carolina, page 7. The attorney general fully argued this issue in the Court of Appeals and it was resolved adversely to him.

[2] We will refer to the State's brief here as "NCBr."

that the claims in the state and federal court were different. What the State *does* urge — and *all* that it urges — is that both courts below erred in determining as a mixed finding of fact and conclusion of law that the attorney general represented the local school boards in the state proceeding as chief legal officer of the state and not merely as representative of a class consisting of all school boards. But this contention provides no ground for still further review by this Court. Indeed, only within the last month, in *Federated Department Stores, Inc.* v. *Moitie*, 49 U.S.L.W. 4687, 4688 n.2 (U.S., filed June 15, 1981), this Court reiterated its adherence to the settled principle that it will not ordinarily review determinations by the lower federal courts on the "real nature" of a pleading.

Despite the failure of the State to present any grounds for certiorari, we believe it necessary that we respond to several seriously misleading statements in the *amicus* brief. A description of these statements and our comments follow:

1. The Attorney General emphasizes that in filing the state court action he "acted *expressly and solely* under the authority of G.S. §§75-14-16 . . . which relate only to antitrust and consumer protection actions." NCBr 6. For emphasis, he adds that "[t]he provisions of G.S. 114-2 were never mentioned in the State's action." *Id.* He then faults the two lower courts for finding that he exercised his more general authority under §114-2. This is in marked contrast to statements by Mr. Jean Benoy, the deputy state attorney general who signed the State's *amicus* brief in this Court, when in a deposition

taken on May 4, 1977, he was asked these questions and gave these answers:

> Q. What was the authority under which you brought this [the state] lawsuit?
>
> A. G.S. Chapter 75 and Chapter 114-2.
>
> Q. And is Chapter 114 the section of code of the state that pertains to the authority of the Attorney General's —
>
> A. The duty of the Attorney General, yes. Chapter 75 says, I believe it is 75-14 or 15, somewhere there, the duty of the Attorney General to prosecute actions of the action. 75-16 says, gives the right of action for treble damage in violations of the term of the chapter, so all of those were the authorizations to bring the action, bring the lawsuit.

Deposition of Jean Benoy, May 4, 1977, Vol. II, 146-147; Appellant's Appendix in the Court of Appeals, Vol. II, pp. 177-78.

2. The State implies that there was a parole agreement among the parties to the state action giving the consent judgment a meaning different than its terms expressed. NCBr 1. Even if such speculation was not precluded as a matter of law (see *United States* v. *Armour & Co.*, 402 U.S. 673 (1971)), it is flatly contradicted by the record. Mr. Benoy testified on deposition in this case:

> Q. Other than the consent judgment signed by Flav-O-Rich and the consent judgment of which we have been speaking, signed by the other defendants, you know of no other written agreements?
>
> A. No, I don't.

Q. Do you know of any oral agreements between Borden and the Attorney General relating to the settlement of the Attorney General's case?

A. No, I do not.

Q. Do you know of any oral agreements between any other defendants and the Attorney General?

A. No, I do not.

Q. That in any way modifies what is in the consent judgments?

A. Not to my knowledge. I know of none.

Q. And is it correct that the terms of the settlement between the Attorney General and all of the defendants in the case are the terms set forth in that consent judgment?

A. So far as I know, yes. Everything that I know of that was agreed to is set forth there.

Deposition of Jean Benoy, May 5, 1977, Volume II, pp. 156-57, Appellant's Appendix in the Court of Appeals, pp. 202-03.

3. The Attorney General asserts that the respondents "considered the idea" of joining the local school boards as parties to the state court proceeding, but "rejected" the idea. NCBr 10. This assertion has no support in the record, and the Attorney General does not cite any. In any event, the framing of the state court complaint was in the hands of the State, not of the respondents.

4. In arguing that petitioner Nash County "never had a full and fair opportunity to present its evidence and argument in support of its claims" and that it "neither knew of nor consented to the State's Consent Judgment" (NCBr 2), the State implies that Nash County was ignorant of the Attorney General's actions. As

noted by the Court of Appeals below, such a suggestion is "somewhat disingenuous" and "[i]t imposes too much [on] credibility to suggest that the School District was ignorant of the Attorney General's action."[1] Pet.App. 82. Further, this argument ignores the findings of the two courts below that the petitioner had the opportunity for a full and fair hearing through its statutorily authorized representative, the attorney general.

5. The Attorney General asserts that he filed the State's action in state court "to protect the state's general economy and to enforce the State's policy prohibiting combinations in restraint of trade, i.e., a *parens patriae* action." NCBr 11. This assertion flies in the face of his pleading in state court. The allegations of his complaint and the relief sought related *only* to sales of milk to the local school boards. Indeed, the Attorney General himself in 1977 described the state case as the "School Milk Bid Case." Appendix to Petitioner's Reply Brief, AP1 and AP5.

6. The Attorney General asserts that the money damages it was seeking in the state action covered the State's "*direct purchases* of fluid milk from respondents." NCBr 11. Again, this is flatly contradicted by the Attorney General's state court pleading. Although paragraph 4(a) of the state complaint recites that the State is bringing the action on its "own behalf as a direct purchaser of fluid milk from the

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[1] The Court of Appeals more specifically noted:

> The School District knew the Attorney General was investigating, with a view to litigation, the purchases of milk by the school districts. He had sent investigators to this School District and these investigators had reviewed those records. The School District thus knew that the Attorney General contemplated filing his action. Later the Attorney General gave wide publicity to the institution of his action.
>
> [Pet.App. 82]

defendants," as well as on its own behalf "as one of the sources of revenue used to pay part of the purchase price of fluid milk by the various public school systems of North Carolina" (Pet.App. 87), there are no allegations in the complaint (nor reference in the later consent judgment) to *any* direct purchases by the State or any state agency other than the local school boards. The "PRODUCT AND GEOGRAPHIC MARKET" described by the State in ¶7 of the state complaint was "fluid milk, ice cream and cheese sold to public school systems within the State of North Carolina." Pet.App. 90. The violation alleged was a "conspiracy in restraint of trade in the sale of milk products to the public school systems of North Carolina." Pet.App. 92. The alleged overt acts in furtherance of the conspiracy were that "defendants at various times continuously since February, 1970, either have submitted identical bids or limited service bids to public school systems in North Carolina." Pet.App. 92-93. The "EFFECTS" of the conspiracy were alleged to be:

> (a) Price competition in the sale of fluid milk to the public school systems in North Carolina has been restrained and eliminated;
>
> (b) Prices paid for fluid milk purchased by the public school systems in North Carolina have been at unreasonably high, artificial and noncompetitive prices.
>
> [Pet.App. 93-94]

In short, the state complaint not only failed to allege any illegal sales to agencies or persons other than the local school boards, but the allegations affirmatively stated that the *only* complained-of activities were directed solely to the local boards. This is consistent with the fact that the extensive investigation by the State preceding the

filing of its lawsuit related only to milk sales to local school districts. Deposition of Donald Jones, June 7, 1977, pp. 44-45, set forth as an Appendix hereto.

7. The Attorney General asserts that the state action sought "monetary damages to the state for its prior *indirect purchases* of fluid milk from Respondents." NCBr 11-12. But *no* indirect purchases by the State were alleged. Although the State contributed financially to the direct purchases by the local school boards, the State did not repurchase any of the milk from the local school boards. Accordingly, the Attorney General's reference to *Illinois Brick Co.* v. *State of Illinois*, 431 U.S. 720 (1977), is inapposite.

8. The Attorney General asserts that the effect of the rulings below is to create an irrebuttable presumption that the Attorney General, "as a matter of *res judicata* under federal law," has fully exercised his authority to represent "every person he is authorized to represent in actions he institutes on behalf of the State." NCBr 13. In so asserting, the Attorney General misperceives the holdings of the two lower courts. Those courts have simply held upon the facts of this particular case that the Attorney General, contrary to his assertion here, did effectively represent the interest of the local school boards in the state court proceeding. These holdings, which are a mixed determination of fact and of state law, are amply supported by the record.

CONCLUSION

The *amicus* brief of the State of North Carolina suggests no reason for review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

/s/ ST. JOHN BARRETT

WILLIAM A. CAREY
ST. JOHN BARRETT
MORTON HOLLANDER
BARNETT, ALAGIA & CAREY
1627 K Street, N.W.
Washington, D.C. 20006
(202) 785-0500

JERRY W. AMOS
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD
1400 Wachovia Building
201 North Elm Street
Drawer U
Greensboro, North Carolina 27402

Counsel for Flav-O-Rich, Inc.

GEORGE WARD HENDON
ADAMS, HENDON, CARSON & CROW, P.A.
601 First National Bank Building
82 Patton Avenue
P.O. Box 7246
Asheville, North Carolina 28807

JOSEPH R. GLADDEN, JR.
KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303

Counsel for The Biltmore Company

JOHN M. MURCHISON, JR.
W. T. COVINGTON, JR.
KENNEDY, COVINGTON, LOBDELL & HICKMAN
3300 NCNB Plaza
Charlotte, North Carolina 28280

GLENN S. DENNIS
HOUSE COUNSEL
Borden, Inc.
180 East Broad Street
Columbus, Ohio 43215

Counsel for Borden, Inc.

JOSEPH H. LEONARD
LEONARD AND SNYDER
113 West Center Street
P.O. Box 614
Lexington, North Carolina 27292

J. MELVILLE BROUGHTON, JR.
BROUGHTON, WILLIAMS & CRAMPTON, P.A.
Suite 1921 Center Plaza Building
411 Fayetteville Street Mall
P.O. Box 2387
Raleigh, North Carolina 27602

Counsel for Coble Dairy Products Cooperative, Inc.

FRED D. TURNAGE
CLEARY, GOTTLIEB, STEEN & HAMILTON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

ROBERT H. DUESENBERG
VICE PRESIDENT AND GENERAL COUNSEL
PET, INC.
Pet Plaza
400 South Fourth Street
St. Louis, Missouri 63102

WRIGHT T. DIXON, JR.
BAILEY, DIXON, WOOTEN, McDONALD & FOUNTAIN
P.O. Box 2246
Raleigh, North Carolina 27602

Counsel for Pet, Inc.

HENRY A. MITCHELL, JR.
SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN
First Union National Bank Building
P.O. Box 31
Raleigh, North Carolina 27602

Counsel for Pine State Creamery Co.

JOHN R. JORDAN, JR.
JORDAN LAW OFFICES
Suite 1414
Branch Banking and Trust Building
333 Fayetteville Street Mall
Raleigh, North Carolina 27602

DAVID L. AUFDERSTRASSE
CHADWELL, KAYSER, RUGGLES, McGEE & HASTINGS
8500 Sears Tower
233 South Wacker Driver
Chicago, Illinois 60606

THEODORE L. BANKS
KRAFT, INC.
Kraft Court
Glenview, Illinois 60025

Counsel for Kraft, Inc.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Supplemental Brief Of The Respondents In Response To The Brief Of The State Of North Carolina, Amicus Curiae was served upon counsel for Petitioner, J. Nat Hamrick, Esq., Hamrick & Hamrick, P.O. Box 470, Rutherfordton, North Carolina 28139, and upon counsel for the State of North Carolina, Jean A. Benoy, Esq., Deputy Attorney General, Western District Office, P.O. Box 790, Forest City, North Carolina 28043, by first class mail with proper postage affixed, this 24th day of July, 1981.

/s/ ST. JOHN BARRETT

BARNETT, ALAGIA & CAREY
1627 K Street, N.W.
Washington, D.C. 20006

APPENDIX

APPENDIX

Deposition Of Donald Jones, June 7, 1977, Part II, p. 44, line 1 — p. 45, line 13; Appellant's Appendix In The Court Of Appeals, p. 223.

Q. In your period of time of investigating the dairy industry in the State of North Carolina, did you ever make any investigations of the price at which milk was sold by processors in North Carolina to hospitals in the State of North Carolina?

A. No, sir. I don't recall one.

Q. Did you ever make any investigation respecting the sale of milk by processors in North Carolina to prisons located in the state?

A. No, sir. I did not.

Q. Did you ever make investigation with respect to the price of milk sold by processors in North Carolina to universities located in North Carolina?

A. No, sir.

Q. Did you ever make any investigation with respect to the price of milk sold by processors in the State of North Carolina to any other state agency in the State of North Carolina?

A. Not that I recall.